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Supreme Court, U.S.
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No. 07-125

IN THE

Supreme Court of the United States

STEVEN MATTES, PETITIONER

v.

BALLYS LAS VEGAS; PARIS HOTEL & CASINO; PARK PLACE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals deny Petitioner's Constitutional right to petition for redress by affirming the trial court's dismissal of the conversion claim for lack of jurisdiction, thereby leaving Petitioner with no forum to seek relief?

2. The Ninth Circuit's Memorandum is inconsistent and conflicts with established law by stating that the Nevada Gaming Control Board has exclusive jurisdiction over conduct of a casino that allegedly converted over $8,000,000.000 from a patron. Because the Nevada Gaming Control Board's jurisdiction is specifically excluded by Nevada statute, the Ninth Circuit decision gives Nevada Casinos carte blanche to effectively steal high rollers cash, knowing that there is no forum for the patron to seek legal recourse.

3. Did the Ninth Circuit err in ignoring and excusing the Respondents' destruction of evidence?

4. Did the Ninth Circuit err in affirming the trial court's vacating of a multi-million dollar jury verdict in favor of Petitioner?

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The Opinion of the United States Court of Appeals for the Ninth Circuit affirming the decision of the District Court filed March 1, 2007, and is set forth in the Appendix, Exhibit 1a.

The Opinion of the United States District Court, filed January 4, 2005, is set forth in Appendix, Exhibit 13a.

Neither Opinion is reported.

JURISDICTION

A timely petition for rehearing was filed and denied on May 2, 2007. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED(see appendix)

STATEMENT

This action involves a dispute between the Petitioner, Steven Mattes, and the Respondents, Park Place, Incorporated, Paris Hotel and Casino, Incorporated, and Bally's Las Vegas. The incident occurred in September, 1999, when Mr. Mattes was invited by a casino host to attend the opening of the Paris Casino in Las Vegas. Mr. Mattes was known as a casino patron who would wager very large amounts of money. Mr. Mattes' had substantial winnings at Bally's during the summer of 1999.

During the summer of 1999, Mr. Mattes won $1,363.000 and later $1,468,000 at Bally's. Mr. Tom Bonanne was a marketing executive for Park Place, Inc., which owned Paris and Bally's Casinos under their subsidiary name, ParBall, Inc. As part of a scheme to increase profits, Mr. Bonanne befriended Mr. Mattes and other "high rollers" in order to convert millions of dollars placed under Respondents' direction and control.

Shortly before September 4, 1999, Mr. Bonanne solicited Mr. Mattes' gaming business for the grand opening of the Paris Casino. As an inducement to gamble at the Paris, Mr. Mattes was promised an unrestricted revolving $2,000,000.00 line of credit; unrestricted "comps" for Mr. Mattes and his family; and private jet transportation from Los Angeles to Las Vegas. As part of the Paris trip, Mr. Bonanne prepared an agreement (i.e., "TTO" - This Trip Only Agreement) which provided Mr. Mattes with a $2,000,000.00 line of credit.. Mr. Mattes has executed "TTO"'s on many other occasions. On each of those previous incidents, Mr. Mattes understood that his line of credit was revolving. Moreover, Mr. Mattes had used "call bets" instead of "rim play" to record loans made during the course of play. Mr. Mattes would not have attended the Paris grand opening had he known that his $2,000,000.00 line of credit was not revolving.

Mr. Mattes started play on September 4, 1999. At the behest of Mr. Bonanne, Mr. Mattes deposited a $1,363,000.00 Bally's check at the Paris Casino cage. This check represented winnings from a trip to Bally's on or about August 17, 1999.. On September 7, 1999, Mr. Mattes was informed that he had used his $2,000,000 line of credit and the $1,363,000.00 "up front" money deposit. Mr. Mattes complained that "rim credit" calculations were incorrect. Rim betting is illegal in most jurisdictions because the player does not have chips. Instead, the host simply calculates win and loss.

Not wanting to disrupt his "best friend's " grand opening, Mr. Mattes calmly asked that his video tapes be reviewed for accuracy. Thereafter, Mr. Mattes asked for additional credit. Mr. Bonanne suggested that Mr. Mattes allow Bally's to stop payment on another Bally's check dated June 20, 1999 in the amount of $1,468,000.00. Mr. Mattes agreed subject to being allowed to continue playing with the $1,468,000.00 added to his line of credit. Mr. Bonanne agreed to these terms before approaching Mr. Goldberg, the Chairman of the Board of Park Place, Inc. After discussing the terms with

Mr. Gold[illegible], Mr. Bonanne caused Mr. Mattes's Bally's check's to be stopped. After stopping payment, Mr. Mattes was not allowed to continue playing at the Paris Casino, but instead, excluded from the casino, video tapes were destroyed, markers forged, and accounting records altered.

In order to justify the exclusion of Mr. Mattes from the Paris Casino, Mr. Bonanne told a number of Mr. Mattes' family and friends that he was excluded because of kiting checks. The trial court ruled that statements made to family members are not derogatory. The trial court's outrageous conduct protected the Nevada gaming industry from charges of industry-wide theft. Not only was Mr. Mattes deceived, when Mr. Bonanne stopped payment on the Bally's check, Mr. Bonanne misrepresented to Bank of America that the check was lost. Eventually, Mr. Mattes' alleged financial problems (i.e. check kiting) were published to various other casino properties and his competitors in his other businesses. As a result, Mr. Mattes was unable to procure any gaming credit and severely maligned in his other businesses.

Prior to the Paris trip, Mr. Bonanne had successfully conspired to use his "best friend" status to convert substantial amounts of money from Mr. Mattes. On January 18, 2000, Mr. Bonanne ordered Mr. Mattes' file be destroyed. Afterward, the file the was either maintained or re-manufactured for litigation or business purposes as it was available at the time of trial to show that Mr. Mattes did not pay his gaming obligations in a timely fashion. This statement was false as Mr. Mattes has paid millions of dollars to various Las Vegas Casinos over the years.

Substantial evidence of misconduct even after Mr. Mattes had stopped patronizing the Park Place properties was introduced at trial. Records were generated showing the contrary (i.e. Park Place claims on December 6, 1999, Mr. Mattes attended or otherwise participated in a NASCAR promotion, on December 2, 1999, Mr. Mattes signed up for a black jack tournament set for 2/27). Mr. Mattes was not in Las

Vegas on either date. The significance of these events is that the Respondents were generating computer events which coincided with amounts allegedly owed by Mr. Mattes to Park Place or related entities. Trial exhibits showed that Mr. Bonanne, while an employee of ParBal, manipulated at will the computer records of the Hilton. This comports with errors found throughout the exhibits, numerous markers, and created a triable issue of fact which precluded summary judgment in this case, as well as established markers as credit instruments which are not within the exclusive jurisdiction of the Nevada Gaming Control Board. *See discussion below.* Therefore, the District Court and Appellate Court's orders to the contrary were in error.

When Mr. Mattes complained about the "rim credit" calculations, he was assured by Mr. Bonanne that Paris' video tapes would be maintained and reviewed for propriety. Despite these assurances, the tapes and original markers were destroyed. This creates a presumption in favor of Mr. Mattes and which precludes summary judgment on its face. See *Reingold v. Wet 'n Wild Nevada, Inc.*, 113 Nev. 967, 970, 944, P.2d 800, 802 (1997).

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit Court Made a Fatal Jurisdictional Error that Deprived Petitioner of *Any* Remedy to Address a Conceded Bona Fide Claim.

If the original judgment on jury verdict were affirmed, the State of Nevada's gaming industry would be substantially impaired. The lower courts submitted to washing their hands of the issue, by denying Petitioner of any jurisdiction for his conversion claim. Here, it is not disputed that Petitioner had a legitimate claim for conversion, supported by substantial evidence sufficient to raise the triable issue of fact that Petitioner won "$3,262,000 which was intentionally offset by

forged, fraudulent, unsigned markers ... used to justify false accounting records." (trial court's order holding that there was evidence that would "preclude summary judgment"). Nevertheless, the trial court threw this claim out of federal district court based on a blatant misapplication of Nevada gaming law that grants the Nevada Gaming Control Board exclusive jurisdiction to hear claims between casinos and patrons based on disputed gaming debts "*not evidenced by a credit instrument.*" Nev. Rev. Stat. § 463.361 (emph. added.) The Memorandum accepted the argument made by Respondents at oral argument that markers do not constitute a "credit instrument" and that Petitioner could and must seek exclusive recourse through the Nevada Board. This is legally incorrect deprives Petitioner now of *any* opportunity to redress a legitimate $3.6 million claim.

A "credit instrument" is specifically defined by Nevada statute to mean any "writing which evidences a gaming debt owed to [a casino] .. and includes any instrument taken in consolidation, redemption or payment of a previous credit instrument." NRS 463.01467 (emph. added). Clearly, a marker is a "credit instrument" and, indeed, probably the most prevalent credit instrument utilized in the gaming industry. Importantly, the same Nevada statutory scheme specifically identifies markers as credit instruments. NRS 6.040 unambiguously identifies the accounting records to be maintained by a casino to include: ... all *markers,* IOUS, return checks, hold checks, *or other similar credit instruments*. NRS 6.040 (emph. added.) During oral argument before the Ninth Circuit Respondent's counsel intentionally misstated the law as to whether a marker is a credit instrument in order to protect the gaming industry.

Here, it is undisputed that Petitioner's claims involved overcharges by the casino for alleged gaming debts that were fully secured and evidenced by markers -- both signed and unsigned -- as well as checks payable to Petitioner and deposited by Petitioner. As such, Nevada law makes clear that Petitioner's claims are outside the exclusive jurisdiction of the

Nevada Board and were properly brought in federal district court.

The error and unfairness of Respondents' position, and the importance of this matter for purposes of correcting it through this writ is further demonstrated by the fact that suits over gambling debts involving markers by casinos against patrons are brought regularly and are currently pending before the federal district courts. In those cases, the casinos themselves take the correct position that markers *are* credit instruments, and thereby out of the jurisdiction of the Board and within the subject matter jurisdiction of the federal district courts. That the casinos make the exact opposite position here because it suits their immediate needs not only underscores the error of the Memorandum, but also underscores the need to correct it to allow for uniform application of the law.

Alternatively, if there is any doubt, the issue of the Board's jurisdiction should be certified and submitted to the Nevada Supreme Court for the correct interpretation of State law, prior to depriving Petitioner of federal jurisdiction. *See Nevada Highway Patrol Ass'n v. State of Nevada* 784 F.2d 1503 (9th Cir. 1992) (petition for rehearing prompted certification of questions about Nevada law to Supreme Court of Nevada) and *Gulfstream Park Racing Ass'n v. Tampa Bay Downs* 399 F.3d 1276 (11th Cir. 2005) (certifying questions regarding Florida's gambling regulatory scheme to Florida Supreme Court).

B. The Jurisdiction of Federal Courts to Decided Disputes Involving Amounts Owed Is a Question That Must Be Addressed to Assure Uniformity of Decisions and Involves a Matter of Extraordinary Importance.

The Memorandum's erroneous ruling on federal court jurisdiction to hear Petitioner's claims is a matter of extraordinary importance because it would deprive similar litigants of any forum to redress legitimate disputes. It is also important because similar cases are routinely brought and are

currently pending in district courts within the Circuit. A correct ruling is critical to ensure a uniform application of law, and to avoid inconsistent rulings in one of the most fundamental threshold issues that the districts courts must address, *i.e.*, the scope of their own jurisdiction.

C. This Case Presents the Timely and Extraordinarily Important Issue of a Corporation's Duty to Preserve Evidence When it Knew Or Should Have Known of a Pending Dispute.

For several reasons, the Memorandum, which allows Respondents to benefit from its admitted failure to preserve material evidence that would have conclusively resolved Petitioner's fraud claim and shifted the burden of proof on the other claims, presents an important, timely issue that merits this Court's review. First, a corporation's failure to preserve relevant evidence, when it knows or should know it is relevant to foreseeable litigation, violates fundamental notions of due process and impugns the integrity of the judicial process. See, *e.g.*, *Grand Casino v. Biloxi v. Hallmark*, 823 So.2d 1185, 1191 (Miss. 2002) (casino's failure to preserve videotape and computer evidence relevant to dispute regarding whether patron had won progressive jackpot prejudiced patron's due process rights, and thus patron was entitled to entire amount of the jackpot.)

Second, if the Court fails in this case to apply its existing prohibitions on the destruction of evidence (see, *e.g.*, *Anheuser-Busch, Inc. v. Natural Beverage Distribs*, 69 F.3d 337, 353 (9th Cir. 1995) (affirming dismissal of counterclaim of spoiliator); *Halco Eng'g Co v. Costle*, 843 F.2d 376, 380 (9th Cir. 1988) (discovery sanctions restore accuracy of the trial, compensate victims of evidence destruction, and deter against evidence destruction); *Akiona v. United States*, 938 F.2d 158 (9th Cir. 1991) (jury permitted to draw adverse inference from spoiliation against party responsible for that behavior),

corporations in general, and casinos in particular, will be less inclined to retain records for trial.

The result, a trial without primary sources of evidence, works an unjustifiable hardship on parties seeking to prove facts and on judges and juries seeking to find facts. *See Malone v. United States Postal Service*, 833 F.2d 128, 130 (9th Cir. 1987) (finding prejudice when spoliation impairs the victim's ability to go to trial or threatens to interfere with rightful decision of case); see also *Mississippi Gaming Comm'n v. Freeman*, 747 So.2d 231, 247 (Miss. 1999) (upholding negative inference against spoiliating casino, stating "...patrons are at the mercy of [the] gaming system and the law, and the judicial system is their only current safeguard.")

That result is particularly dangerous here, where a casino has taken money from a patron and then destroyed crucial evidence that would have proved the money was taken improperly. As currently written, the Court's opinion holds that, even in the face of evidence that a corporation had notice of imminent litigation (*i.e.*, an oral request to preserve records, promises to preserve all surveillance tapes and accounting records surrounding the dispute, and a letter to the casino referencing potential claims, an internal document that states "Tape is saved,"), the corporation has no obligation to preserve those records -- because the patron did not write a letter specifically identifying the tape, and demanding that it be saved.

Such a holding merits a writ of certiorari for another reason. If the Court adopts the standard articulated in the Memorandum, the Court misses an opportunity to address the destruction of evidence in the casino-patron context.

Finally, a writ of certiorari presents the opportunity for the Court to clarify the law on destruction of evidence inconsistent with a corporation's internal record retention policy.

D. Material Points of Fact and Law Were Overlooked in the Memorandum.

Petition for panel review is warranted for another important reason. The Memorandum overlooks material facts which, if considered, would necessitate a different outcome.

Most telling is the Memorandum's acceptance of the trial court's determination that damages awarded by the jury were "*speculative*" and that "*the damage award appears to have been prospective earnings from gambling.*" (Mem. p. 7) This was central to the Court's affirmance and was the central basis for the trial court's granting of the new trial because, according to the trial court, "it is simply impossible to determine the evidentiary basis for the jury's damages awards."

Such finding is an abuse of discretion because it misstates the case and completely ignores the evidence (undisputed in many crucial instances, but overlooked in the Memorandum) showing that the damages sought and awarded by the jury were tied -- *not* to "prospective gambling earnings" -- but instead tied to specific dollar amounts shown at trial to have been misappropriated by the casino. Two clear examples overlooked by the Memorandum are as follows.

First, the jury awarded damages of $2,558,000 on the breach of contract cause of action. This is exactly the same amount of the so-called gambling "losses" that Respondents admittedly charged Petitioner based on *markers that he undisputedly never signed.* It is undisputed that casinos overcharged Petitioner for unsigned markers totaling $2.558 million. Markers are no different from checks or other negotiable instruments and are not valid if not signed. Certainly, overcharging a patron supports breach of contract. A fundamental term of any gambling agreement is that, in exchange for betting, the casino will pay off winnings and not charge for losses that were never incurred. The jury was correct

in awarding that amount back as part of the breach of contract damages.

Second, the jury awarded damages in the amount of $1,468,000 on the conversion cause of action. This amount coincides exactly to the $1.448 million check that Petitioner delivered to, and was canceled by, Respondents on the express condition and promise that he be allowed to continue playing. This promise was undisputed -- as was the fact that the Respondent's casinos breached it. There simply was and is no evidence to the contrary. Petitioner was entitled to -- and the jury awarded him -- restoration of that amount that was wrongfully taken from him on false pretenses.

Certainly, these damage awards were not "speculative," nor were they tied in any way whatsoever to "prospective gambling earnings." The Ninth Circuit ignored that the trial court abused its discretion by finding, in the face of such evidence, that "it is simply impossible to determine the evidentiary basis for the jury's damages awards." *See Roy v. Volkswagen of America, Inc.* 896 F.2d 1174, 1176 (9th cir. 1990) ("if the jury's verdict is not clearly against the weight of the evidence, the trial court abuses its discretion in ordering a new trial").

The Memorandum also overlooks material facts in critical areas where it expressly -- but incorrectly -- finds that the record lacks substantial evidence on key elements.[1]

These statements overlook the following direct evidence: Petitioner risked substantial sums of money in

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[1] Also the breach of contract and fraud in the inducement claims, the "verdict was against the clear weight of the evidence *because there was no substantial evidence that Paris agreed that the credit line could not be revoked, had a specific duration, or would be handled in a particular manner*" and further that Petitioner "*did not introduce any evidence the credit line was revolving in the manner he suggested.*" (See Mem., pp. 2, 5, emph. added.)

exchange for a written TTO agreement. A TTO is a term of art in the gaming industry, and is used to attract high rollers. The written TTO states the specific duration (three days), as well as the initial credit line ($2 million). There is no provision giving the casino the right to revoke it. That the credit line was "revolving" was proven by, among other things, Respondents' own evidence showing how the casinos actually calculated Petitioner's balance (constituting proof of Petitioner's actual *course of dealing* during the same trip, whereby the casinos consistently credited gains to the ongoing balance -- i.e., they treated it as a revolving credit line). The Memorandum simply overlooks this evidence by erroneously concluding that the terms "were not supported by the language of the agreement or any other competent evidence" (Mem., p. 3.), when in fact the evidence was clear and direct.

As to the fraud claim, the Memorandum states, that the evidence "*fails to demonstrate either the existence of a specific agreement that was violated or a misrepresentation.*" (Mem. p. 4, emph added.)

Here, the Memorandum overlooks the direct evidence that Petitioner tendered the $1,468,000 check to the casino on the express promise that he be allowed to remain playing at the Paris.[2] In addition to Petitioner's testimony, this was *judicially admitted* by Respondents in response to requests for admissions. ("Defendants admit that at a point in time during his September 1999 trip to Paris, plaintiff asked that Bally's stop payment on a $1,468,000 check payable to plaintiff and that he be allowed to gamble with the proceeds").) Despite this understanding, it is undisputed that Respondents took the check, stopped payment, and immediately escorted Petitioner out of the

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[2] According to the Memorandum, "petitioners' claim that the casino's markers were forged and its accounting records falsified was, according to the court, based on "speculation" and "not supported with any foundation." (Mem. p. 5.)

casino.

The Memorandum also overlooks that it was undisputed at trial and in opposition to summary judgment that Respondents charged Petitioner at least $2.558 million based on *unsigned* markers. The fact that they were unsigned is *prima facie*, if not conclusive, evidence that the amounts charged were not owed. Further, Respondents' evidence to support their claims was based solely on certain accounting records which were, at best, inconsistent on their face and in many instances prove Petitioner's claim -- based not only on Petitioner's testimony, but on the testimony of Respondent's own witnesses. Certainly, Respondents' inconsistent and damaging records do not rise to evidence "clearly against the weight" of Petitioner's evidence included proof that he was charged for markers he never executed.

According to the Memorandum, Petitioner's claim that the casinos wrongfully destroyed video-taped evidence was not supported by the evidence because Petitioner's letter sent to Appellee Paris did not specifically "*mention destruction of evidence or request that any evidence be preserved.*" (Mem. p. 5, emph. added.)

Here, the Memorandum overlooks the following evidence. While still at the Paris, Petitioner specifically informed Appellee's agent, Mr. Bonanne, that he wanted to review all records that had occurred on the trip. Both Petitioner and Bonanne testified that Petitioner gestured to the video cameras, while he was being escorted out, clearly indicating that he was being mistreated while there. In the subject letter which was read to Bonanne immediately after the incident, Petitioner specifically complained that, during the trip, Paris "made unjust, self-serving decisions" . . . "crossed the line of fair gaming and the implied covenant of good dealing" . . . that the Paris management was "admit[tting] damages" . . . and that there were "material issues of fact" deserving "scrutiny." Bonanne responded to this letter by falsely assuring Petitioner that all records would be preserved and reviewed.

Such evidence is more than sufficient to establish that Respondents were on notice of a dispute, were requested to preserve records and promised to do so. It is undisputed that they failed to do so. The Memorandum errs by overlooking this evidence and vindicating Respondents simply because the subject letter does not make specific reference to the videotape. This puts an undue burden on Petitioner, not supported by the law. See, *Unigard Sec Ins. v. Lakewood Eng'g & Mfg,* 928 F.2d 363, 366-367 (short blurb on case) .

Further, the Memorandum completely negates Trial Exhibit 40, which unambiguously refers to the fact Petitioner was charged for unsigned markers and that: "TOM BONNANE. MIKE ALLGEIER AND, SURVEILLANCE ARE AWARE. THE TAPE IS SAVED."

This evidence makes it clear that Mr. Bonnane and Mr. Allegeier were aware of a dispute over the unsigned markers, that the tapes would be evidence to resolve the dispute, and that the tape was saved for that very purpose. Yet the Memorandum completely dismisses and ignores this evidence because it is a "Hilton document" and not evidence that Paris Casino destroyed the tapes. (Memorandum, p. 5.) What the Memorandum ignores is that, it is undisputed that Paris Casino destroyed the tapes, and that Bonnane -- who is specifically referenced in the letter -- had acted as Paris Casino's agent throughout (he is the one who arranged the TTO) and, that he and Mr. Allegeier had acted then, and on a regular bases, as dual agents for both Respondents and Paris Casino, and that the two casinos acted together. But regardless, to negate this evidence on the grounds that it is written on a Hilton form, completely ignores that the document direct evidence showing Bonanne's awareness of the dispute, the relevance of the tape, and the need to save it.

Properly considering the above evidence overlooked in the Memorandum, cited above on each of these issues, it is clear that trial court abused its discretion in upsetting the jury verdict. *See, Roy v. Volkswagen, supra,* 896 F.2d at 1178-1179

(granting of new trial was an abuse of discretion where there was conflicting evidence where [as here] there was no indication that the verdict was the result of sympathy). Furthermore, and at an absolute minimum, these overlooked items (as well as the other evidence discussed below), are more than sufficient to create triable issues of material fact on each of Petitioner's causes of action. A writ to the Ninth Circuit Court of Appeals is warranted.

1. The District Court erred in granting Respondents' Motion for a New Trial and vacating the Judgment on Jury Verdict

a. The Post-Trial Order of the District Court

In April, 2003, the District Court granted Respondents' Motion for a new trial.[3]

The Court granted a motion for a new trial following a clean, successful trial which resulted in a jury verdict and judgment in excess of $8,000,000 in favor of Mr. Mattes. Until the order granting Defendant's Motion for a New Trial, the

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[3] In its Order the District Court stated:

> The Court finds that the verdict is rife with errors and leaves the Court with "the definite and firm conviction that a mistake has been committed." *Landes Construction Co., Inc.*, 833 F.2d at 1371. It is internally inconsistent and generally unsupported by credible evidence. Plaintiff proved no actionable defamation or fraud, and it is simply impossible to determine the evidentiary basis for the jury's damages awards. These errors are only compounded by the flawed verdict form which prompted the jury to prematurely consider punitive damages without instruction from the Court or the benefit of bifurcated proceedings and render an award of punitive damages in a manner inconsistent with NRS 42.005. In light of the pervasive nature of these and a host of other errors, and in the interest of justice, the Jury Verdict and Judgment in a Civil Case must be set aside in their entirety, and a new trial on all issues must be ordered.

District Court had denied Defendants' Motion for Summary Judgment and FRCP 50(b) motions. With all due respect to the District Court, Petitioner believes that a number of legal errors occurred which support reversal of the order granting the new trial and reinstatement of the jury's verdict.

b. Legal standard on motion for new trial

The trial court may grant a new trial if the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice." *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999), quoting *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440, 1452 (9th Cir. 1988)); *Fenner v. Dependable Trucking Company, Inc.*, 716 F.2d 598, 602 (9th Cir 1983). The District Court has the power to consider the evidence and credibility of witnesses, when deciding whether to grant a new trial, but **only if the verdict appears to him to be against the weight of the evidence**. *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 540 (1958). *Landes Construction Co., Inc.*, 833 F.2d 1365, 1371 (9th Cir. 1987); *Air-Sea Forwarders, Inc. v. Air Asia Co., Ltd.*, 880 F.2d 176, 190 (9th Cir. 1989); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2806, at 48-49 (1973)); accord, *Fenner,* 716 F.2d at 602. Essentially, the Court serves as a "13nth Juror". **A motion for a new trial is rarely granted as there is a strong public policy against overturning a jury's verdict**. Additionally, where evidence has been destroyed by a party, the motion should not be granted. In this case, the Ninth Circuit ignored the fact that Respondents knowingly destroyed the video tapes of Mr. Mattes' play.

c. Substantial evidence confirms the jury's breach of contract verdict.

Explanation of the 3 contracts.

Mr. Mattes' breach of contract claims consisted of three distinct contracts.:

1. Inducement to gamble at Paris Casino

The first contract was one which invited Mr. Mattes to gamble at the grand opening of the Paris Casino. In exchange for agreeing to gamble at that facility, the Defendants agreed to provide a safe, properly supervised, fairly run gaming property. Moreover, Mr. Mattes was promised by his dearest friend and gaming confidant (Mr. Bonanne) that he would be given a $2,000,000 revolving line of credit. *See above discussion*

2. Agreement to stop payment on Bally's Check No. 8848.

The second contract was a conditional agreement to stop payment on a $1,468,000 Bally's check in exchange for being allowed to play against the "adjusted credit line". That contract was breached when Mr. Bonanne stopped payment on Bally's Check No. 8848, kept the funds, but would not allow Mr. Mattes to continue playing. Instead, Mr. Mattes was instructed to gamble elsewhere.

3. Settlement Agreement.

The third contract was a settlement agreement induced by fraud. Specifically, Mr. Mattes was informed by Mr. Bonanne that he owed $524,000 on three markers: Marker #1724629 ($232,000); #1724681 ($242,000); and #1724372 ($50,000). As is discussed above, the settlement agreement was induced by fraud as the markers allegedly being paid off had not been signed and admittedly were not enforceable.

Revolving Credit Agreement --Substantial evidence supports Mr. Mattes' understanding that his line of credit was "revolving."

Respondent's own accounting records are revolving.

The Circuit Court ruled that there was no evidence that Mr. Mattes' line of credit was revolving. This is a factual error as Respondents' own records admitted at trial prove that the line of credit was "revolving". (i.e., *Rim Sheets, Account Run Down Affidavit of Dave Ellis.* Specifically, the Rim Sheet and Account Run Down form calculate the "amount available" for play by increasing and decreasing the balance depending on

credit issued and payments made. Much like a credit card, the line was exhausted only when the amount of credit issued net of payments and other adjustments, equaled or exceeded the agreed upon limit. In this case, the $2,000,000 limit was never reached.

Furthermore, if the lines were not revolving then additional markers should not have been issued after the first two markers because Respondent's credit obligation had been fully satisfied. It is undisputed that as of 9-6-99, $2,000,000 of markers had been issued. None the less, $5,558,000 of markers were issued thereafter. If the lines were not revolving, then no markers would have been issued after the first day of play because the cumulative amount lent on that day was $2,100,000.

The "Rim Sheets" are also significant as the amount "Available" shown in the upper right hand corner of the card changed on each day. Clearly, the "line of credit" was going up and down, like a credit card (i.e., it was "revolving"). Undisputedly, the issuance of markers did not cease once the cumulative total of credit exceeded $2,000,000. Instead, the amount due was adjusted to reflect payments and the issuance of additional debt. In other words, the credit was "revolving".

A marker analysis also shows that the credit was revolving.

An analysis of Respondents' markers also proved that the line of credit was revolving. With respect to that, the first two markers allegedly issued to Mr. Mattes equaled $2,000,000 (9-5-99 - #1722101 - $1,000,000; 9-6-99 - 1724138 - $1,000,000). If it is true that the Respondents were only required to grant credit on a cumulative basis up to $2,000,000, then no other markers should have been issued after 9-6-99 at 19:23. Obviously, the lines of credit were revolving as the Respondents issued an additional $5,000,000 of markers. This would not have occurred if line of credit was "non-revolving"

Likewise, the Respondents' "Account Run Down" analysis is prepared on a revolving basis. As with the Rim

Sheets, the Respondents' "Account Run Down" sheet accounts for markers on a revolving basis. Again, if the lines of credit were not revolving, then no markers would have been issued after 9/6/99 (i.e., when $2,000,000 of markers had been issued).

The Stop Payment on Bally's Check No. 8848 - There is substantial evidence that a "Stop Payment Contract" existed on 9-7-99, and was conditioned upon Mr. Mattes being allowed to play against the adjusted credit line.

There is evidence supporting the stop payment contract (i.e., , stopping payment on Bally Check No. 8848, $1,468,000 in exchange for being allowed to play on the adjusted line of credit). The testimony at trial was that Mr. Mattes agreed to allow the stop payment on Bally's check No. 8848 in exchange for being allowed to continue play on the adjusted line of credit.

Respondents' retort is that the stop payment occurred on 9-8-99 as part of settling Mr. Mattes' marker account. As with Defendants' "revolving argument", its own accounting records contradict this argument (i.e., the stop payment was ordered and accounted for on 9-7-99, not 9-8-99 as part of leaving the property)

As is discussed above, substantial evidence exists proving that the stop payment occurred on 9-7-99, not when Mr. Mattes was settling his account on 9-8-99.

Substantial evidence confirms the jury's Breach of the Covenant of Good Faith and Fair Dealing verdict in this case.

Treating the revolving credit line as the only breach of the covenant of good faith and fair dealing ignores significant evidence to the contrary. Specifically, the covenant of good faith and fair dealing was breached by the fraudulent conduct of the Defendants (e.g., forged signatures on markers; internal documents show that Mr. Mattes actually won while representing that he had lost millions of dollars; video tapes were destroyed; settlement contracts were induced by fraud

which included inflating balances created by admittedly improper markers; redemption vouchers were post dated in order to create a defense to improperly stopping payment on Bally's check no. 8848; when Mr. Mattes complained he was maligned (accused of kiting checks).These acts establish contractual and tortuous breach of the covenant of good faith and fair dealing. Each of these facts are substantiated by documentary evidence and testimony at trial. See *Hilton Hotels v. Butch Lewis Productions, Inc.*, 107 Nev. 226, 808 P.2d 919, 922-923 (1991) and *Perry v. Jordan,* 111 Nev. 943, 950, 900 P.2d 335, 229 (1995). There was substantial evidence to support this claim.

Substantial evidence of Fraud

Fraud in the inducement.

Petitioner signed the "Credit Limit Increase Report" which provided him credit of $2,000,000 for the trip. Defendants never intended to provide Petitioner $2,000,000 of credit. As soon as they had recovered the Bally's checks, they excluded him from the property. Trial evidence proved that Petitioner never accessed the full amount of the credit.

Fraud in claiming that the line of credit was nonrevolving.

Petitioner testified during trial that his credit had always been revolving. Other Paris accounting records show that Petitioner' lines of credit were being accounted for as if they were revolving. ("Account Run Down"). When Petitioner requested further play after payment on Bally's check No. 8848 was complete, he was told that his line was not revolving. This was false as Defendants' own accounting records report the line on a revolving basis.

Marker Fraud.

A number of the markers are missing the appropriate signatures, are forged, or the signatures are not discernable. Petitioner testified that he did not receive the original markers

despite requesting the same on several occasions. Forging, altering or otherwise falsifying markers is evidence of fraud.

Accounting Fraud.

A number of documents were altered in order to increase the marker amounts allegedly due.

The Redemption Voucher # 914558 misstates the date, amounts of markers and amounts received.

Trial exhibit Redemption Voucher # 914492, dated 9/8/99 states that a payment was received in the amount of $1,468,000. That represented the stop payment on Bally's check no. 8848, dated 6-20-99 (TE 12) 8 ER 1262. However, the origin of the payment is listed as only $468,000 and Marker 1724138 is shown as being -0-. The actual amount of that marker was $1,000,000. As a result of these errors, Petitioner was adversely affected in that Petitioner owed $232,000 and Marker # 1724138 in the amount of $1,000,000 was still not paid. The fraud was further escalated by alterations made to Paris' accounting records.

Finally, the Respondents knew that the Redemption Voucher was incorrect as handwritten notations on the marker state in cursive: "VA S/B 1,468,000. V/A = stop payment on previous check issued #8848". Clearly, ParBall employees had discovered the error but failed to correct the same. As a result $1,000,000 was converted from Petitioner on this transaction alone. Contrary to Respondents' assertions Mr. Bonanne had the unfettered power to order changes to the Paris computer records ("9-8-99 $1,000,000 line taken out of computer per Tom").

C. Settlement/Discount Fraud.

Among the trial exhibits was a Settlement agreement that was obtained by fraud. As is discussed above, the 3 markers being discounted had no value, but none the less, were used to induce Petitioner to pay an additional $34,000.

D. Fraudulent accounting .

Evidence admitted at trial proves that Petitioner' trip was actually profitable, not a loss (i.e., $3,262,000 winnings).

See above discussion. The Redemption Vouchers were altered to create marker liability sufficient to offset Petitioner? winnings.

The Ninth Circuit erred in its analysis of Petitioner' claim for slander per se .

The Ninth Circuit erred in allowing the trial court's questioning parts of the jury's verdict, instead of a verdict under a "totality" approach. The ruling is also contrary to the law on establishing a prima facia case of slander per se.

Slander per se does not require a specific statement accusing Petitioner of kiting checks.

Comments made by the Court with respect to Petitioner's slander per se verdict, appear to contradict the current status of the law. Specifically, the Court held that slanderous statements made to Petitioner's spouse and/or family members were insufficient to establish a slander per se prima facie case. Additionally, the Court held that implications that Plaintiff was kiting checks is insufficient to satisfy a "slander per se" claim for relief (i.e., it was necessary for someone to directly accuse Petitioner of kiting and for him to be damaged by the accusation and proof that he was denied credit as a result of the accusation). The Court applied an incorrect standard.

Slander per se may be proven by implication.

There is no specific requirement that someone specifically be accused of a crime and prove damages before a slander per se claim is sufficient proven.[4]

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[4] We agree with the analysis of the district court. The imputation of shoplifting, by words or by pantomime, if communicated to a third party, is unquestionably slander per se. See *Safeway Stores v. Rogers*, 186 Ark. 826, 56 S.W.2d 429 (Ark. 1933); *American Stores Co. v. Byrd*, 229 Md. 5, 181 A.2d 333 (Md. 1962); *Tumbarella v. Kroger Co.* 85 Mich. App. 482, 271 N.W.2d 284 (Mich. App. 1978); *Southwest Drug Stores v. Garner*, 195 So. 2d 837 (Miss. 1967); *Hall v. Heavey*, 195 N.J. Super. 590, 481 A.2d 294 (N.J. Super. Ct. App. Div. 1984); *Mains v. K-Mart Corp.*, 297

No specific accusations are required. In fact, slander per se can be proven by pantomime. In this case, Petitioner was maligned verbally and by "pantomime" (being escorted out of the building after being told he could not play any longer at the Paris Casino). The circumstantial evidence offered and admitted at trial is significant in this case (i.e., line of credit request turned down; Petitioner not allowed to play at the Paris Casino any longer; Mattes family told Petitioner was kiting checks; Petitioner denied credit anywhere in Las Vegas; Petitioner told that he is being denied credit in Las Vegas because of the problems he had at the Paris). Slander per se does not require proof of damage. Damage is presumed in slander per se cases. Further, pantomime or conduct that makes a statement is sufficient to prove slander per se. Obviously, Petitioner was accused either directly or indirectly of kiting (e.g., Kiting was given as an excuse for banning him from the Paris Hotel and Casino; Mrs. Mattes (wife) was told that Petitioner was required to gamble elsewhere because of kiting; Mrs. Mattes (mom) heard the term kiting be used as a reason for Petitioner' banishment). If the correct standard for slander per se had been used by the trial court, Respondents' motion for a new trial would have been denied.

Kiting is a crime under the slander per se rules.

S.C. 142, 375 S.E.2d 311 (S.C. Ct. App. 1988); see also, *G.H. Genzel, Annotation, Defamation: Actionability of Accusation of [***27] Imputation of Shoplifting*, 29 A.L.R.3d 961 (1970 & Supp. 1993). We conclude, as a matter of law, that the words and conduct of K-Mart were capable of defamatory construction in that the pantomime imputes criminal conduct to Washington. "The truth or falsity of an allegedly defamatory statement is an issue of fact properly left to the jury for resolution." *Posadas v. City of Reno*, 109 Nev. 448, 453, 851 P.2d 438, 442 (1993).

See *Branda v. Sanford*, 97 Nev. 643; 637 P.2d 1223; 1981 Nev. LEXIS 615.

Check kiting is a federal crime:[5]

This case is particularly significant. First, it confirms that it is not necessary to specifically state "you are a check kiter". All that is necessary for slander per se is the imputation that Petitioner was kiting checks. In this case substantial imputation of kiting exists. Second, it is not necessary to prove damages for slander per se. Those damages are presumed.

Sufficient evidence was admitted at trial to overcome a motion for a new trial on the claim for slander

Contrary to the Court's observation, there was sufficient evidence presented at trial to support the jury's award on the claim for slander. That evidence include the trial testimony of Steve Mattes, Mrs. Greenberg, Michelle Mattes, and Mrs. Mattes (Steve's mother).

The undisputed testimony was that Petitioner' reputation was damaged and that he was unable to get credit as a result of Defendants' comments that he was kiting checks. The value of the lost credit is easy to calculate as Trial Exhibit 1 is a Hilton "Table Lifetime Summary" which states that Petitioner has available credit of $4,000,000. Obviously, the value of Petitioner' good name declined by $4,000,000 as a result of the defamation. The $1,000,000 verdict was not overstated, but instead, understated by $3,000,000.

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5 The Guidelines stipulate that in fraud cases, "as in theft cases, loss is the value of the money, property or services unlawfully taken. . . ." U.S.S.G. @ 2F1.1 application note 7. The time to determine that loss in a check-kiting scheme is the moment the loss is detected. Accord, *United States v. Shaffer,* 35 F.3d 110, 114 (3d Cir. 1994) (adopting Frydenlund analysis and noting that " check kiting crimes, because of their particular nature, are crimes where the district court must calculate the victim's actual loss as it exists at the time the offense is detected. . . .")

See *United States of America v. Asher*, 59 F.3d 622; 1995 U.S. App. LEXIS 16050, at 625.

The Court erred in analyzing the damages in separate parts, rather than using the "totality" approach.

Introduction

The Appellate Court affirmed the ruling of the trial court which failed to consider the jury's verdict in its entirety, which is the proper approach. This means that the Court focused on parts of the verdict instead of the entire verdict. The result is a finding that parts of the verdict are overstated without considering whether the entire verdict is flawed. When considered in its entirety, the verdict is reasonable. This error in analyzing damages is discussed in *4.0 Acres of Land*, 175 F.3d 1133 (9th Cir.1999), where the Court discussed what is referred to as the "component" analysis of damages.6

In *4.0 Acres of Land*, supra, The Court reversed the order granting a new trial.[7]

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6 The "totality of the evidence" approach that looks beyond the specific numbers used in the expert opinions is appropriate. See *1,162.65 Acres of Land*, 498 F.2d at 1301. This approach reflects the discretion accorded the jury in weighing the credibility of witnesses and looking critically at experts' analyses. We cannot conclude, as Norville urges, that each component of the jury's award must be within the range of each component of expert testimony, and that evidence other than the appraisals has no role. n11. Were we to adopt Norville's suggested approach, we would discredit the role of the jury and give unbounded discretion to the district judge to override a jury's verdict. We conclude that, here, the clear weight of the evidence justifies the jury's decision to find Norville's appraisals suspect and to reject he appraisers' assertions of diminished value in the remaining property.

Id at 1142.

7 The district court erred in granting a new trial. Where the jury's verdict is not against the clear weight of the evidence, a district court abuses its discretion in ordering a new trial. See *Roy*, 896 F.2d at 1176. Such is the case here. We find no evidence of impropriety in the jury proceedings or in the jury instructions. The district court should not second-guess a jury verdict based on a juror's statements to the press after a verdict is entered. All of the evidence, including that which weakens appraisers' expert opinions

In the present case, the jury's verdict was not outside the range of evidence presented, when the evidence is evaluated as a whole. The trial court erred in that it improperly compartmentalized the verdict (e.g., negligence and fraud) without reviewing the damages in their entirety. That approach had a significant impact as the negligence and fraud awards were diminimus in comparison to the other damages awarded in this case. Moreover, the larger damages were not flawed (e.g., Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing). The test that should be imposed is based on the "totality" of the evidence. When considered in their entirety, the damages are reasonable, and not against the clear weight of the evidence.

When the evidence is viewed it is "totality", the verdict was reasonable and supported by the evidence presented at trial

The jury verdict was reasonable and supported by the evidence introduced at trial. Petitioner lost millions of dollars due to fraud in the accounting for his markers. If the "totality of damages" approach had been used, the courts would realize that the damages are actually understated as the evidence reflects that Ms. Mattes actually won over three million dollars.

If Petitioner won $3,262,000 he would not have been required to use the 2 Bally's checks. The amounts of those checks are $1,363,000 and $1,468,000 The total including the converted checks total $6,093,000 before considering defamation and punitive damages.

> as to the value of the property or the likelihood that the remainder will diminish in value must be considered. Severance damages need not be awarded in every partial takings case. The jury award was not outside the range of evidence presented and a new trial should not have been granted.

Id at 1143, [emphasis added].

The jury awarded $1,000,000 in defamation damages and $1,500,000 of punitive damages. The defamation damages are reasonable as Petitioner was approved for credit in amounts ranging from 2,000,000 to 4,000,000 over the years. As is discussed below, after being accused of kiting, Petitioner could not obtain credit in Las Vegas. Obviously, the rumors reduced his credit value from $4,000,000 to -0-. When considered in totality, the proper evidence supports damages of $10,093,000, before punitive damages are even considered. Since just over $8,000,000 in damages was awarded, including punitive damages, the "totality" analysis would find that the awarded damages were more than reasonable.

The District Court erred in inquiring from the jurors as to how they calculated damages in the underlying case.

During the hearing on this matter the District Court admitted that it had specifically discussed with jurors how they reached their decision on the damages in this case: This was improper.

In *United States of America v. 4.0 Acres of Land*, 175 F.3d 1133; 199 U.S. App.LEXIS 8457 (1999), the Ninth Circuit addressed this issue and ruled.[8]

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[8] A juror's observations may not be used as grounds to grant a new trial absent exceptional circumstances. Rule 606(b) of the Federal Rules of Evidence prohibits a juror from testifying about the jury's deliberations or how the jurors reached their conclusions unless extraneous prejudicial information was improperly brought to the jury's attention." Neither party alleges that extraneous prejudicial information was brought to the jury's attention. Rule 606(b) also prohibits any evidence of any statement by a juror "concerning a matter about which the juror would be precluded from testifying" from being used in an inquiry into a jury's verdict. There was no official inquiry into the jury's verdict in this case. Apparently, the juror's post verdict statements to the press distorted the lens through which the district court viewed the verdict. The statements should not have been considered. n10.

The Ninth Circuit erred in stating that the District Court's inquiry of the jurors was not improper. FRE 606(b) prohibits discussions with jurors regarding their mental processes (i.e., prior to a resolution of post trial motions).

In plain language Rule 606(b) clearly prohibits the use of juror's statements or mental impressions that occurred during deliberations to impeach a verdict. Fed. R. Evid. 406(b).[9] See *United States v. Henley*, 238 F.3d 1111, 1117-1118 (9tb Cir. 2001) (testimony about juror's mental processes in reaching verdict barred by Rule 606(b)); *United States v. 4.0 Acres of Land,*175 F.3d 1133, 1140 (9th Cir. 1999) (same); *Moruan v. Woessner*, 997 F.2d 1244, 11260-1262 (9th Cir. 1993) (same). Similarly, Rule 606(b) prohibits inquiry into a juror's statements or mental impressions during deliberations. When the District Court specifically discussed with jurors how damages were arrived at by the jury, it erred. The Ninth Circuit should have reversed the trial court's order granting a new trial, thereby reinstating the jury's verdict.

The Appellate Court affirmed the dismissal of the conversion claim based on its misinterpretation of the

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Id. at 1140.

[9] (b) Inquiry into validity of verdict or indictment:
Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Nevada Revised Statutes regarding the jurisdiction of the Nevada Gaming Control Board.

The final decision of the District Court was to dismiss the conversion claim for lack of subject matter jurisdiction. Throughout this case, the Respondents had argued that jurisdiction lay exclusively with the Nevada Gaming Control Board. The District Court disagreed on numerous occasions. In fact, the Defendants went so far as to seek certification of this issue to the Nevada Supreme Court, which the District Court also denied. The Ninth Circuit Court of Appeals affirmed, incorrectly ruling that a marker is not a credit instrument, and totally ignoring the checks that Respondents stopped payment on and converted the funds.

The Nevada Gaming Control Board absolutely DOES NOT have exclusive jurisdiction to resolve a disputed evidenced by a credit instrument.

As discussed above, a large part of this case involves the propriety of a number of "credit instruments" . The Nevada Gaming Control Board has exclusive jurisdiction to resolve a disputed claim, **except** when the same is evidenced by a credit instrument.[10]

Obviously, the Nevada Supreme Court has recognized the exception applying to credit instruments. Undisputedly, the

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[10] The Nevada Gaming Control Board has exclusive jurisdiction to resolve a disputed claim, such as Sengel's, by a patron of a gaming license for payment of a gambling debt that is not evidenced by a credit instrument. NRS 463.361 (2)(a).n1 No other remedy [*569] exists to enforce a [***5] gaming debt **not evidenced by a credit instrument**. NRS 463.361 (1).

See *Sengel v. IGT,* 116 Nev. 565, at 568,569; 2 P.3d 258; 2000 Nev. LEXIS 77 (2000).

Mattes debt involves suspect credit instruments. Since this issue has already been resolved by the Nevada Supreme Court and is expressly provided for by statute, the trial and appellate courts erred in ruling that the Nevada Gaming Control Board had exclusive jurisdiction. This Court should interpret the plain language of the statute, and issue a writ to the Ninth Circuit because the markers in dispute in this proceeding clearly are credit instruments that are specifically excluded by statute.

If the manner of the game is disputed, then Gaming Control Board must be immediately notified.

Pursuant to N.R.S. 463.362, if there is a dispute as to the manner in which a game is conducted, which triggers jurisdiction of the Gaming Control Board, the licensee, in this case, Park Place, is required to immediately notify the gaming control board:[11]

There is absolutely no evidence that Respondents complied with NRS 463.362.1(a) or NRS §463.362 (i.e., notifying gaming of the dispute). The failure to notify gaming is evidence that Respondents have never believed that "the manner in which the game [was] conducted" was at issue, and that this is not a dispute within the jurisdiction of the Nevada Gaming Control Board.

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11 NRS 463.362 Resolution of dispute as to winnings, losses or manner in which the game is conducted.

1. Whenever a licensee and a patron have any dispute as to alleged winnings, alleged losses or the manner in which a game is conducted, the licensee and the patron are unable to resolve the dispute to the satisfaction of the patron and the dispute involves: $500, the licensee shall immediately notify the board.

(a) At least $500, the licensee shall immediately notify the board;

...

3. Failure of the licensee to notify the board or inform the patron as provided in subsection 1 is grounds for disciplinary action pursuant to NRS 463.310 to 463.3145, inclusive.

CONCLUSION

THEREFORE, Petitioner respectfully requests of this Court that it GRANT this Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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No. 05-15248

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVEN MATTES,
Plaintiff - Appellant,
v.
BALLYS LAS VEGAS; PARIS HOTEL & CASINO; PARK PLACE INC.,
Defendants - Appellees.

January 11, 2007, Argued and Submitted, San Francisco, California

March 1, 2007, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

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For BALLYS LAS VEGAS, PARIS HOTEL & CASINO, PARK PLACE INC., Defendants - Appellees: Scott M Mahoney, Esq, Las Vegas, NV; J. Randall Jones, Esq, Jennifer Popick, Esq., HARRISON KEMP & JONES, CHTD., Las Vegas, NV; Mark S. Karris, LAW OFFICES, Las Vegas, NV.

JUDGES: Before: TASHIMA and CALLAHAN, Circuit Judges, and SCHIAVELLI ** , District Judge.

OPINION

MEMORANDUM *

Before: TASHIMA and CALLAHAN, Circuit Judges, and SCHIAVELLI **, District Judge.

Steven Mattes, a high stakes blackjack player, appeals the district court's order setting aside an $ 8 million jury verdict in his favor and granting a new trial, and its subsequent grant of summary judgment in favor of Appellees Park Place Entertainment Corp. and Parball Corp. d/b/a Paris-Las Vegas and Bally's-Las Vegas (collectively, "Paris"), which were erroneously sued under other names. Mattes argues that the jury verdict was proper and should not have been set aside, and that even if that ruling is upheld, the district court should not subsequently have granted summary judgment to Paris in lieu of a new trial. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm in all respects.[1]

We conclude that the jury's verdict was contrary to the clear weight of the evidence; therefore, the district court did not abuse its discretion in granting a new trial. *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir. 1999); *Landes Constr. Co. v. Royal Bank of Can.*, 833 F.2d 1365, 1371 (9th Cir. 1987).

The breach of contract verdict was against the clear weight of the evidence because there was no substantial evidence that Paris agreed that the credit line could not be revoked, had a specific duration, or would be handled in a particular manner, and hence no meeting of the minds. See, e.g., *Roth v. Scott*, 112 Nev.

1078, 921 P.2d 1262, 1265 (Nev. 1996) (outlining requirement for breach of contract); *Back Streets, Inc. v. Campbell*, 95 Nev. 651, 601 P.2d 54, 55 (Nev. 1979) (same). Moreover, Mattes' subjective interpretation of the terms of the credit agreement were not supported by the language of the agreement or any other competent evidence.

The jury verdict on the breach of covenant claim was similarly contrary to the evidence. In order to recover on a contractual breach of covenant theory in Nevada, Mattes would have had to show that his reasonable or justified expectations were denied. *Perry v. Jordan*, 111 Nev. 943, 900 P.2d 335, 338 (Nev. 1995); *Hilton Hotels Corp. v. Butch Lewis Prods.*, 107 Nev. 226, 808 P.2d 919, 923-24 (Nev. 1991). Even if the evidence established that Mattes expected to be able to continue gambling, this expectation would have been legally insignificant because courts have regularly held that gamblers do not have rights to continue gambling on credit or other terms. See, e.g., *Uston v. Airport Casino, Inc.*, 564 F.2d 1216, 1217 (9th Cir. 1977) (stating that relationship between casino owner and prospective gambler did not implicate "[t]he policies upon which the innkeeper's special common law duties rested," and hence exclusion of gambler from casino was acceptable); *Spilotro v. State*, 99 Nev. 187, 661 P.2d 467, 471 (Nev. 1983) ("Appellant does not have a constitutional right of access to businesses, such as casinos, that are generally open to the public.").

Mattes' tortious bad faith theory fails as a matter of law, moreover, because he had no "special relationship" with the casino. Nevada courts have "limited bad faith tort actions to those cases involving special

relationships characterized by elements of public interest, adhesion, and fiduciary responsibility." *Great Am. Ins. Co. v. General Builders, Inc.*, 113 Nev. 346, 934 P.2d 257, 263 (Nev. 1997) (citation omitted). Mattes fails to point to any cases that have established a "rare and exceptional case" of special duty between a casino and a gambler, or that indicate that such a relationship might have arisen here. Id.; *Hilton Hotels Corp.*, 808 P.2d at 923 n.4; *K Mart Corp. v. Ponsock*, 103 Nev. 39, 732 P.2d 1364, 1370 (Nev. 1987). The fact that both the casino and Mattes are sophisticated in the business, moreover, counts against the implication of any special duty. *Great Am. Ins. Co.*, 934 P.2d at 263. Accordingly, the breach of covenant verdict was properly set aside.

The verdict was against the clear weight of the evidence on the fraud claim as well. Most importantly, the documents that Mattes relies on to establish the alleged fraud fail to demonstrate either the existence of a specific agreement that was violated or a misrepresentation. As to Mattes' claim that there was fraud in destroying evidence and that Bonanne misrepresented to him that tapes would be maintained and reviewed and that any errors would be corrected, moreover, the evidence does not support Mattes' contentions. Mattes cites a letter he sent to Paris complaining about his stay in September 1999, but Mattes did not mention destruction of evidence or request that any evidence be preserved in this letter. Mattes' other exhibits are likewise inapposite, as for instance Trial Exhibit ("TE") 40, which is a *Hilton* document indicating that a certain tape "is saved," and not evidence that the Paris Casino destroyed tapes.[2]

Mattes' claim for fraudulent inducement fails because

Mattes did not introduce any evidence that the credit line was revolving in the manner he suggested. Moreover, Mattes' speculation about forged markers and accounting records is not supported with any foundation to indicate that documents were altered or that there is any nefarious reason for discrepancies.

The conversion claim is both based upon internal casino documents about which there is no evidence Mattes was competent to testify, and is nonetheless against the clear weight of the evidence because of the extensive testimony that the casino responded properly to Mattes' situation by applying the check against his debt. Accordingly, the district court properly set aside the jury's verdict for conversion, as well.

The defamation verdict in this case was also against the clear weight of the evidence. "A statement is defamatory when it would tend to lower the subject in the estimation of the community, excite derogatory opinions about the subject, and hold the subject up to contempt." *K-Mart Corp. v. Washington*, 109 Nev. 1180, 866 P.2d 274, 282 (Nev. 1993) (citation omitted). As Mattes notes, a statement is considered slanderous per se if it imputes that a plaintiff has committed a crime, and the plaintiff will not need to prove damages in such a case; instead, they are presumed. *Id.* at 283; *Branda v. Sanford*, 97 Nev. 643, 637 P.2d 1223, 1225-26 (Nev. 1981).

That the casino had its own concerns about check kiting, however, did not impute that Mattes had committed a crime. Moreover, especially given Mattes' own denial that Bonanne accused him of check kiting and his and Patty Richards' attribution of his

difficulties in Las Vegas to the *lawsuit* rather than to any accusation of check kiting, the district court properly concluded that a verdict for defamation was against the clear weight of the evidence. There is no evidence that Paris communicated its situation with Mattes to anyone outside his family, and even the communication to Mattes' family is only tenuously linked to an accusation of check kiting, which Mattes' family members, in any event, did not believe. The district court did not abuse its discretion in finding that Mattes was not accused, or damaged from the fact of imputation, of kiting checks. Any non-check-kiting comments are inactionable either because they are too vague or because Mattes did not demonstrate that they were untrue.[3]

Furthermore, the district court did not erroneously hold it necessary to ascertain the jury's exact basis for damages on each claim, and instead properly concluded that the damages awarded were speculative and warranted setting aside the verdict. *Snyder v. Freight, Constr., Gen. Drivers, Warehousemen & Helpers, Local No. 287*, 175 F.3d 680, 689 (9th Cir. 1999). Notably, to the extent that the basis for the damages award appears to have been prospective earnings from gambling that Mattes was allegedly denied, such a theory has been regularly rejected by the courts, which refuse to allow recovery of speculative damages. *Frantz v. Johnson*, 116 Nev. 455, 999 P.2d 351, 360 (Nev. 2000); *Peterson v. Wiesner*, 62 Nev. 184, 146 P.2d 789, 799 (Nev. 1944). Mattes' conjectural testimony and briefing based on internal casino documents is insufficient to establish a basis for damages. Accordingly, it was not an abuse of discretion for the district court to respect established rules against speculative damages. For all

of these reasons, the district court's setting aside of the jury's verdict was proper.[4]

We further conclude that the district court did not err in granting defendants' motion for summary judgment post-trial, a question we review de novo. *Universal Health Servs. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004); *Seattle-First Nat'l Bank v. Conaway*, 98 F.3d 1195, 1196 (9th Cir. 1996). Notably, we do not need to reach the merits of the summary judgment arguments raised below, because Mattes simply refers this court to his arguments there for why summary judgment should not have been granted. Incorporation of arguments by reference in this manner is prohibited. 9th Cir. R. 28-1(b); Fed. R. App. P. 28(a)(9)(A); *Cmty. Commerce Bank v. O'Brien*, 312 F.3d 1135, 1136 (9th Cir. 2002). However, even if we address the merits of the motion for summary judgment, the grant was proper given Mattes' lack of personal knowledge of the documents he interprets and his failure to demonstrate elements of his claims. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

"A trial court can only consider admissible evidence in ruling on a motion for summary judgment," *Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002) (citations omitted), and a party opposing summary judgment "must set forth *specific facts* showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (emphasis added); see *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990) ("The object of [Fed. R. Civ. P. 56(e)] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.") (citations omitted); *T.W. Elec. Serv., Inc. v. Pacific Elec.*

Contractors Ass'n, 809 F.2d 626, 631 (9th Cir. 1987) ("[I]f a *rational* trier of fact might resolve the issue in favor of the nonmoving party, summary judgment must be denied.") (citation omitted) (emphasis added).[5]

Mattes' breach of contract claim fails because there is no evidence to establish that he was damaged, even accepting that there was a genuine issue of material fact about the existence of an agreement in this case. Gamblers do not have established rights to continue gambling at particular casinos. Moreover, with respect to internal casino documents and policy, Mattes failed to establish that he possessed the requisite personal knowledge to testify on these topics, and summary judgment was proper.

Mattes' claim for breach of covenant fails because there was no evidence of an obligation on the part of Paris to allow Mattes to continue gambling, or of any special relationship between Mattes and the casino. *Great Am. Ins. Co.*, 934 P.2d at 263; *Hilton Hotels Corp.*, 808 P.2d at 923 n.4.

With respect to the fraud claim, moreover, Mattes fails to provide any properly admissible evidence to support his theories, because they are based on internal casino documents about which he had no demonstrated competence to testify, and the damages are purely speculative.

In fact, the evidence presented with respect to damages is too speculative for each claim, since it hinges either on prospective gambling winnings or on Mattes's interpretation of documents about which he has no established expertise. This fact defeats Mattes'

defamation claim, as well. Accordingly, summary judgment was properly granted against Mattes on each of these claims.

We further conclude that the district court properly ruled upon the conversion claim because, in its ultimate iteration, it involved gaming debts which were not evidenced by a credit agreement and, thus, falls squarely within the exclusive jurisdiction of the Nevada Gaming Control Board ("Board"). According to Nev. Rev. Stat. § 463.361(1), and unless otherwise provided, "gaming debts that are not evidenced by a credit instrument are void and unenforceable and do not give rise to any administrative or civil cause of action." Nev. Rev. Stat. § 463.361(1). Instead, such gambling debts are within the exclusive jurisdiction of the Board. *Erickson v. Desert Palace, Inc.*, 942 F.2d 694 (9th Cir. 1991); *Devon v. Unbelievable, Inc.*, 820 F. Supp. 528, 529 (D. Nev. 1993); *Sengel v. IGT*, 116 Nev. 565, 2 P.3d 258, 260 (Nev. 2000). As this court has previously observed:

We do not believe the Nevada legislature intended to allow parties to avoid the administrative process simply by alleging fraud in a patent attempt to force a casino to turn over alleged winnings. Under NRS 463.361, *parties who assert they are owed a gaming debt, fraud or no fraud, are confined to the administrative process followed by state judicial review.Erickson*, 942 F.2d at 697 (emphasis added). Mattes' claim falls clearly within this category, because he is attempting to recover a gaming debt allegedly owed, which he argues he legitimately won or would have won. See *id.* at 696 ("'Nevada characteristically categorizes suits to collect unpaid gambling winnings as gaming debts.'") (citation omitted). The district court properly noted the

evolution of Mattes' conversion theory during the course of the proceedings, and the shift in Mattes' theory appropriately convinced the district court that the claim was within the Board's exclusive jurisdiction.

For the reasons set forth herein, the orders of the district court setting aside the jury verdict and subsequently granting summary judgment in favor of defendants are
AFFIRMED.

Footnotes

*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

**The Honorable George P. Schiavelli, United States District Judge for the Central District of California, sitting by designation.

1Because the parties are familiar with the facts and procedural history, we do not recite them except to the extent necessary to aid in understanding this disposition.

2As to an alleged misrepresentation about Mattes' credit, Mattes fails to point to specific evidence that he indeed had fine credit and that this was impugned by Paris. Although TE 4, a Hilton document, does indicate that Mattes was approved to receive $ 1 million credit, this fact does not establish that there was fraud in any of Paris' concerns about Mattes ability to pay his debts. To the contrary, there was trial testimony from casino employees that the casinos evaluated credit

independently, and also evidence that Mattes had had difficulties in repaying casinos in the past.

3Mattes' slander by "pantomime" theory, based on Mattes' being escorted from the casino, is untenable. The case of Washington, which Mattes cites, found defamation by pantomime where the plaintiff was approached on suspicion of shoplifting and then "grabbed [], chased [], tackled [], handcuffed [], and then led [] back into the store in front of a crowd of people." 866 P.2d at 283. The circumstances surrounding Mattes' treatment, in contrast, would not impute that Mattes was guilty of a crime.

4There is no indication in the record that the district court used its post-trial conversation with jurors as a basis for its subsequent rulings or to impeach the verdict, thereby running afoul of the law or Federal Rule of Evidence 606(b). Although "[a] juror's observations may not be used as grounds to grant a new trial absent exceptional circumstances," *4.0 Acres of Land*, 175 F.3d at 1140, the comments at issue here were not used as a basis for the district court's decision, contrary to the situation, for instance, in 4.0 Acres of Land. See id.

We need not reach the issue of bifurcation of the punitive damages phase of trial or the merits of the punitive damages award, because other defects in the verdict, as the district court acknowledged, necessitated setting aside the verdict. See, e.g., *Consolidated Data Terminals v. Applied Digital Data Sys.*, 708 F.2d 385, 388 (9th Cir. 1983) ("We likewise vacate and remand the district court's award of

punitive damages since they are dependent upon the outcome of the retrial on the tort issues.").

5The district court noted, in deciding the motion for summary judgment, that it had "the benefit of having observed the universe of evidence at the November, 2002, trial of Plaintiff's claims," but there is no indication -- contrary to Mattes' assertion -- that the district court improperly assessed the evidence for purposes of summary judgment by not viewing the evidence in the light most favorable to Mattes, or that the district court was motivated by any animosity towards Mattes in its decision.

Filed: 01/04/05
Case No.: CV-S-00- 1090-JCM (LRL)
UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

STEVEN MATTES,
Plaintiff,

vs.

PARIS PLACE, INC.; PARIS HOTEL AND CASINO, INC.; BALLY'S LAS VEGAS; DOES I-X,
Defendants

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This suit arises from an invitation to gamble at the 1999 Grand Opening of the Paris Hotel & Casino extended to Plaintiff, Steven Mattes ("Mattes"), a highroller with a history of play at other Park Place properties. Mattes claims that he accepted Paris' invitation on the promise that he would be given a $2 million irrevocable revolving line of credit at Paris.

At some point during Mattes' trip, after Mattes had drawn down the credit line and lost the entirety of his front money, Paris decided not to continue to extend Mattes any more credit and asked Mattes to move his action to the Las Vegas Hilton. Mattes sued Park Place Entertainment Corporation (incorrectly named as Park Place, Inc. and hereinafter referred to as "PPE") and Parball Corporation dba Bally's Las Vegas and Paris Las Vegas (incorrectly named as Paris Hotel and Casino, Inc. and Bally's Las Vegas and hereinafter

referred to as "Paris"), asserting claims for Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, Negligence, Fraudulent Misrepresentation, Negligent Misrepresentation, Fraudulent Inducement, Slander, and Conversion.

This Court presided over the November, 2002, jury trial of these claims which resulted in a verdict in Mattes' favor which was factually and legally unsupported. On motion by the Defendants, this Court set aside the verdict and ordered a new trial. (#141). Discovery was not re-opened. On August 16, 2004, Defendants filed a Motion for Summary Judgment (# 169) seeking summary adjudication of each of Plaintiffs claims. Plaintiff's 61 page Opposition (#184) was stricken by this Court on October 7, 2004, as a violation of LR 7-4, and Plaintiff was granted leave to file a rule-compliant opposition. (#190). Plaintiff's First Amended Opposition filed on October 19, 2004, (#192) was, on its face, a blatant violation of LR 10-1 and in effect LR 7-4, and on December 3, 2004, this Court granted Defendants' Motion to Strike the same. (# 199). Plaintiff requested leave of court to try one last time to provide a rule-compliant opposition, and on December 8, 2004, this Court granted Plaintiff's request (#202) and accepted his Second Amended Opposition. On December 13, 2004, Defendants filed their Response to Plaintiff's Second Amended Opposition to Motion for Summary Judgment (#203).

On December 16, 2004, this Court held oral argument on the Motion for Summary Judgment. Plaintiff, Steven Mattes, appeared at the hearing together with his counsel Kevin Mirch, Esq., and Marie Mirch, Esq., and on behalf of Defendants, J. Randall

Jones, Esq., and Jennifer C. Popick, Esq., appeared along with Mark Clayton, Esq. This Court having: 1) reviewed the Motion, Second Amended Opposition and Response thereto; 2) the benefit of having observed the universe of evidence at the November, 2002, trial of Plaintiffs claims; and 3) scoured the record for any genuine issue of material fact in support of Plaintiffs claims, finds that Plaintiff's claims for Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, Negligence, Fraudulent Misrepresentation, Negligent Misrepresentation, Fraudulent Inducement and Slander are unsupported by the evidence. Simply, there exist no genuine issues of fact to support Mattes' recovery upon any of these theories, and summary judgment is dictated on each of these claims as a matter of law. FRCP 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The only claim which may present issues of fact which potentially preclude summary judgment is Plaintiff's conversion cause of action. As Plaintiff's Second Amended Opposition explains, this claim is based on Mattes' theory that "Mattes won $3,262,000 which was intentionally offset by forged, fraudulent, unsigned markers ... used to justify false accounting records." (Second Amended Opposition at p. 30). Mattes further contends that "Defendants' own records prove that the same were altered in order to offset the amount earned by Mr. Mattes." Id. However, such allegations put this claim squarely within the exclusive jurisdiction of the Nevada Gaming Control Board and divest this Court of jurisdiction pursuant to NRS Chapter 463. See NEV. REV. STAT. §463.362; Erickson v. Desert Palace, Inc., 942 F.2d 694 (9th Cir. 1991). Mattes' claim is plainly one regarding a disputed

gaming debt not evidenced by a credit instrument. Erickson, 942 F.2d at 695 (citing Harrah's Club v. _State Gaming Control .Bd., 104 Nev. 762, 766 P.2d 900 (1988); and State Gaming Control Bd. v. Breen, 99 Nev. 320, 323, 661 P.2d 1309, 1311 (1983)). "Under NRS 463.361, parties who assert they are owed a gaming debt, fraud or no fraud, are confined to the administrative process followed by state judicial review." Id. at 697. Thus, even if there were sufficient genuine issues of material fact to preclude summary judgment on the merits of Plaintiff's conversion claim, it must nevertheless be dismissed for lack of subject matter jurisdiction pursuant to NRS 463.361 et seq. as jurisdiction over this claim is vested exclusively in the Nevada Gaming Control Board.

Accordingly, Defendant's Motion for Summary Judgment is hereby GRANTED. IT IS FURTHER ORDERED that this case is DISMISSED, all other pending motions are DENIED as moot, and the JURY TRIAL and all further hearings are hereby VACATED.

JUDGMENT SHALL BE ENTERED ACCORDINGLY.

Filed: 5/2/07
No. 05-15248
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVEN MATTES,
Plaintiff - Appellant,
v.
BALLYS LAS VEGAS; PARIS HOTEL & CASINO; PARK PLACE INC.,
Defendants - Appellees.

ORDER

JUDGES: Before: TASHIMA and CALLAHAN, Circuit Judges, and SCHIAVELLI ** , District Judge.

The panel has voted to deny the petition for rehearing. Judge Callahan votes to deny the petition for rehearing en banc, and Judges Tashima and Schiavelli so recommend. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

Footnote

**The Honorable George P. Schiavelli, United States District Judge for the Central District of California, sitting by designation.

Nevada Revised Statute §463.361

463.361. Enforceability and resolution of gaming debts.

1. Except as otherwise provided in NRS 463.361 to 463.366, inclusive, and 463.780, gaming debts that are not evidenced by a credit instrument are void and unenforceable and do not give rise to any administrative or civil cause of action.

2. A claim by a patron of a licensee for payment of a gaming debt that is not evidenced by a credit instrument may be resolved in accordance with NRS 463.362 to 463.366, inclusive:

(a) By the board; or

(b) If the claim is for less than $500, by a hearing examiner designated by the board.

No. 07-125

FILED
AUG 29 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

STEVEN MATTES,

Petitioner,

v.

BALLY'S LAS VEGAS; PARIS HOTEL & CASINO; PARK PLACE, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

The district court set aside a jury verdict in favor of the Petitioner after finding it was against the clear weight of evidence and unsupported by Nevada law, and summary judgment was entered in favor of the Respondents. Agreeing that Petitioner's claims were based on nothing more than his "conjectural testimony" and mischaracterized evidence, the Ninth Circuit Court of Appeals affirmed in an unpublished memorandum decision. Should this Honorable Court exercise its certiorari discretion to consider the Petitioner's claim that the Ninth Circuit "misapplied" Nevada law and "overlooked material facts" in this case, which involves issues important only to the Petitioner?

CORPORATE DISCLOSURE STATEMENT

The named Respondents are Park Place, Inc., Paris Hotel & Casino, and Bally's Las Vegas. Paris Las Vegas and Bally's Las Vegas are dbas of Parball Corporation ("Parball"). Parball is owned 100% by Harrah's Operating Company, which is owned 100% by Harrah's Entertainment, a publicly owned company. "Park Place, Inc.," is not actually an entity.

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STATEMENT OF THE CASE

Petitioner Steven Mattes ("Mattes") is a disgruntled gambler who, after losing millions of dollars during a 40+ hour blackjack streak at the 1999 opening of the Paris Hotel & Casino, contends that Paris's refusal to extend him additional credit – not merely his bad luck – prevented him from beating the house. Mattes claims Paris engaged in a vast conspiracy stretching from corporate executives to casino floor employees, but the real facts of this case are much more mundane. This case is really about one man's vainglorious disbelief that he could possibly lose in Las Vegas and his crusade to blame someone – anyone – else for his misfortune.

Mattes first blamed Paris, claiming his winnings were stolen from him through artfully-fraudulent casino accounting. After his case ended in summary judgment, Mattes blamed the district court, insisting that its rulings were the result of the court's personal dislike for him, not the meritlessness of his claims. And now that the Ninth Circuit has affirmed the district court's decision and refused en banc reconsideration, Mattes has shifted the blame to the appellate court and crudely repackaged his thrice-rejected arguments for a new audience.

But Mattes's superficial challenge to every factual conclusion in the Ninth Circuit's opinion falls short of justifying this Court's attention. Although Mattes characterizes portions of the Ninth Circuit's decision as "jurisdictional" errors in an effort to artificially infuse this case with public importance, the errors he alleges fall squarely into two categories: 1) misapplications of Nevada gaming law, and 2) overlooked facts. Neither of these case-specific, alleged errors justifies a writ of certiorari.

ARGUMENT

A. The Ninth Circuit's Application of Clear Nevada Law to the Facts of this Case Did Not Result in a "Fatal Jurisdictional Error."

Mattes cites as his first reason for granting the petition for certiorari a "fatal jurisdictional error" by the Ninth Circuit depriving him of "any jurisdiction for his conversion claim." The error, he claims, is the lower courts' conclusion that his conversion claim – which is based on Mattes's allegation that Paris falsified its accounting records to make it appear that he had lost millions of dollars when, in fact, he was winning – is a patron dispute that falls within the jurisdiction of the Nevada Gaming Control Board ("the Board"), not the federal courts. Nevada's comprehensive gaming laws give the Board exclusive jurisdiction to adjudicate disputes between patrons and casinos over "alleged winnings [and] alleged losses,"[1] but exclude from the Board's jurisdiction debts "evidenced by a credit instrument."[2] Mattes contends that the Ninth Circuit based its ruling on the erroneous premise that casino markers[3] do not qualify as credit instruments and thereby deprived him of any forum for his conversion claim. Mattes misstates the basis of the panel's ruling and grossly overstates its impact.

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[1] NEV. REV. STAT. § 463.362.

[2] NEV. REV. STAT. § 463.361.

[3] A marker is "a check that can be written at the gaming tables by a player who has established credit with the casino. An IOU." http://www.gamingtoday.com/Glossary.

1. The Ninth Circuit Did Not Discuss Credit Instruments.

Mattes's focus on the legal characterization of casino markers is based on either a complete misunderstanding or a blatant misrepresentation of the Ninth Circuit's decision. The circuit court was not under a mistaken legal impression that markers are not credit instruments – indeed, the question of whether markers are credit instruments did not factor into the court's analysis.[4] Instead the court properly applied its decision in *Erickson v. Desert Palace, Inc.*, which simply holds that "parties who assert they are owed a gaming debt, fraud or no fraud, are confined to the administrative process followed by state judicial review"[5] to conclude that Mattes's claim that Paris converted his winnings through forgery and fraud "falls squarely within the exclusive jurisdiction of the Nevada Gaming Control Board."[6]

Mattes conspicuously claims Paris owed him a gaming debt – he emphasizes, "[h]ere it is undisputed that [his] claims involved overcharges by the casino for alleged gaming debts."[7] But he turns Nevada law on its head to

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[4] Despite his convoluted allegations to the contrary, the "debt" Mattes claims Paris owes him is not "evidenced" by markers. The markers he's referring to are those he claims are forged, altered, falsified, and therefore totally unreliable. *See* Petition at 19-21 (arguing that the markers "were altered in order to increase the marker amounts allegedly due," and "were altered to create marker liability sufficient to offset Petitioner? [sic] winnings"). Mattes contends that *the falsity* of the markers – and the fact that they shouldn't exist at all – is the evidence of Paris's debt to him.

[5] Appendix at 9a (quoting *Erickson v. Desert Palace, Inc.*, 942 F.2d 694 (9th Cir. 1991)).

[6] *Id.*

[7] Petition at 5.

misrepresent to this Court, "Nevada law makes clear that Petitioner's claims are outside the exclusive jurisdiction of the Nevada Board and were properly brought in federal district court." It is *Erickson* that is clear: in Nevada, "suits to collect unpaid gambling winnings" fall within the exclusive jurisdiction of the Nevada Gaming Control Board.[8] Mattes's conversion claim is no exception, and the Ninth Circuit correctly found that "Mattes's claim falls clearly within this category, because he is attempting to recover a gaming debt allegedly owed, which he argues he legitimately won or would have won."[9]

2. An Adequate and Appropriate Forum Exists for Mattes's Conversion Claim.

Mattes's contention that the absence of federal court jurisdiction deprives him and "similar litigants of *any* forum to redress legitimate disputes"[10] against casinos is exaggeration to the point of fabrication. His real problem with the Ninth Circuit's decision is not that it leaves him without any forum, but that he prefers the federal court system to the administrative process. A preference

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[8] *Erickson*, 942 F.2d at 696.

[9] Appendix at 9a. Mattes also suggests that "the issue of the [Nevada Gaming Control] Board's jurisdiction should be certified and submitted to the Nevada Supreme Court for the correct interpretation of State law." Petition at 6. As Mattes never raised this argument below – and in fact, he vehemently contended that certification of this issue to the Nevada Supreme Court was improper – this Court should not consider it now. *See Youngberg v. Romeo*, 457 U.S. 307, 316 n. 19 (1982); *Dothard v. Rawlinson*, 433 U.S. 321, 323 n. 1 (1977); *Duignan v. United States*, 274 U.S. 195, 200 (1927); *Old Jordan Mining & Milling Co. v. Societe Anonyme des Mines*, 164 U.S. 261, 264-265 (1896).

[10] Petition at 6 (emphasis added).

for another forum, however, is not a deprivation of all remedies. By vesting jurisdiction over alleged gaming debts in the Board, Nevada gave gamblers a specific, knowledgeable forum for their claims: "the administrative process followed by state judicial review."[11] Casino patrons like Mattes have a forum for the redress of their disputes, and certiorari is not necessary.[12]

B. This Case Does Not Concern a Corporation's Duty to Preserve Evidence in the Face of a Pending Dispute Because There Is No Evidence That Mattes Notified the Casino that a Claim Was Imminent.

However "timely" or "extraordinarily important" this Court might consider a corporation's duty to preserve evidence when it knows or should have known of a pending dispute, this case does not implicate that duty. In yet another effort to inject this case with relevance beyond its own boundaries, Mattes claims that the Ninth Circuit's "opinion holds that, even in the face of evidence that a corporation had notice of imminent litigation ... the corporation has no obligation to preserve those records," giving this Court the opportunity "to clarify the law on destruction of evidence."[13]

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[11] *Erickson*, 942 F.2d at 697.

[12] Mattes's bald suggestion that review by this Court is necessary "to assure uniformity" of decisions is a red herring. This is a state law issue. This Court's oversight is not necessary or appropriate "to ensure a uniform application of [Nevada] law, and to avoid inconsistent rulings," Petition at 7, between the district courts within the Ninth Circuit.

[13] Petition at 8.

But the Ninth Circuit's opinion contains no comment about the corporate duty to preserve evidence. The panel only observed that the proof Mattes offered to support his spoliation theory failed to establish that Mattes notified Paris that he wanted the casino to preserve video tapes of his activities:

> As to Mattes's claim that there was fraud in destroying evidence and that [casino employees] misrepresented to him that tapes would be maintained and reviewed and that any errors would be corrected . . . the evidence does not support Mattes's contentions. Mattes cites a letter he sent to Paris complaining about his stay in September 1999, but Mattes did not mention destruction of evidence or request that any evidence be preserved in this letter. Mattes's other exhibits are likewise inapposite, as for instance Trial Exhibit 40, which is a *Hilton* document indicating that a certain tape "is saved," and not evidence that the Paris Casino destroyed tapes.[14]

Thus, the unpublished memorandum disposition only discusses the insufficiency of Mattes's evidence to prove destruction of evidence; it is silent as to the general scope or application of the law of corporate duty. Mattes's subjective belief that the lower courts' assessment of that evidence was faulty is not a "compelling reason" for this Court to grant certiorari.

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[14] Appendix at 4a.

C. A Writ of Certiorari Is Not Available to Review Overlooked Facts and Misapplied Law.

As his last point of error, Mattes contends that the Ninth Circuit panel ignored his inexpert analysis of highly-technical, casino accounting records when it concluded that the evidence fell substantially short of proving Mattes's claims. Mattes provides this Court with a 21-page regurgitation of more than a dozen arguments he presented to – and had rejected by – the lower courts. With this kitchen-sink approach, Mattes essentially asks this Court to conduct a document-by-document and claim-by-claim analysis of the 2,600-page record to arrive at a different conclusion than reached by both lower courts.

But that's not this Court's job. As this Court explained in *National Labor Relations Board v. Pittsburgh S.S. Co.*, the United States Supreme Court does not exercise its certiorari discretion to review evidentiary records for sufficiency:

> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. . . . In such situations we should "adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations."[15]

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[15] 340 U.S. 498, 503 (1951) (quoting *Federal Trade Comm'n v. American Tobacco Co.*, 274 U.S. 543, 544 (1927)); *see also General Talking P. Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938).

This Court must "leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality."[16]

And an assessment of the record for substantiality is precisely what Mattes desires. He claims that the Ninth Circuit "overlook[ed] material facts in critical areas where it expressly – but incorrectly finds that the record lacks substantial evidence on key elements"[17] and offers this Court his version of those facts and their significance to his claims. Many of these facts, Mattes boldly contends, are "undisputed." Indeed, he uses the word "undisputed" eight times in this subsection. For example, Mattes states, "It is undisputed that [Respondents] overcharged Petitioner for unsigned markers totaling $2.558 million."[18] But this contention is not merely disputed, it is one of the most-disputed contentions in this case.

Mattes also characterizes as "undisputed" the propositions that: 1) Respondents breached their agreement to let him continue to play at the Paris after he lost all of his money and his million-dollar credit line; 2) Respondents destroyed casino surveillance tapes despite the knowledge that Mattes wanted them preserved because he was going to file a lawsuit; and 3) witness testimony demonstrates that Mattes's reputation in the gaming community was damaged and "that he was unable to get credit as a result of [the Paris casino host's] comments that he was kiting checks." As the Ninth Circuit's opinion indicates, however, these facts were not just disputed, they were completely

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[16] *National Labor Relations Board*, 340 U.S. at 502.

[17] Petition at 10.

[18] Petition at 9.

belied by the evidentiary record, which reveals: 1) no proof – other than Mattes's self-serving testimony – that Paris "agreed that the credit line could not be revoked . . . or would be handled in a particular manner, and hence [there was] no meeting of the minds"[19]; 2) a complete absence of evidence that Paris was alerted to a potential claim or Mattes had asked Paris to preserve surveillance tapes;[20] and 3) that Mattes was never accused of check kiting; Paris merely voiced "its own concerns about check kiting."[21] Regardless, Mattes admitted that he was not accused of check kiting, and the only testimony about Mattes's credit difficulties in Las Vegas attributed his problems "to the lawsuit rather than to any accusation of check kiting."[22] Mattes's flippancy in misadvising this Honorable Court of the nature of the evidence and the proceedings below only highlights the baselessness of his petition.

A page-by-page review of a multi-ream record to scrutinize a circuit court's assessment of the evidence and potentially reverse an unpublished decision that impacts only one person is not what the certiorari process contemplates. As this Court held in *Layne & Bowler Corp. v. Western Well Works*, "it is very important" for the United States Supreme Court to "be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and

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[19] Ninth Circuit Opinion, Appendix at 2a.

[20] *See supra* at p. 6.

[21] Appendix at 5a.

[22] *Id.* at 5a-6a.

authority between the Circuit Courts of Appeals."[23] Whether the 2,600-page record in this case contains enough evidentiary support for Mattes's claims that the jury verdict should not have been set aside or Mattes's claims should not have been disposed of on summary judgment is a matter of individual – not national – importance, and Mattes has identified no conflict of authority between any circuit courts. Supreme Court Rule 10 cautions, "certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."[24] Mattes has offered this Court no reason to conclude that his is one of those rare cases.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[23] 261 U.S. 387, 393 (1923).

[24] SUP. CT. R. 10.